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Nos. 92-593 and 92-767

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MIGUEL DEGRANDY, *et al.*,
Appellants,
v.
T. K. WETHERELL, *et al.*,
Appellees.

UNITED STATES OF AMERICA,
Appellant,
v.
STATE OF FLORIDA, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Florida

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MOTION TO AFFIRM IN PART AND VACATE IN PART

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MOTION TO AFFIRM IN PART AND VACATE IN PART

The Florida State Conference of NAACP Branches and the individual NAACP plaintiffs ("NAACP") move this Court to summarily affirm the three-judge court's liability determination regarding the State's plan for redistricting the Florida Senate, but to summarily vacate the three-judge court's remedy determination and remand the cases for a remedial hearing to determine whether complete relief can be fashioned for the Section 2 violations that have been found to exist.

STATEMENT OF THE CASE

The federal court proceedings to reapportion and redistrict Florida's Senate districts[1] involved three separate suits that eventually were consolidated for trial.

The first suit was filed on January 14, 1992 by Miguel DeGrandy, an Hispanic member of the Florida House of Representatives, and a group of individual Hispanic voters ("the DeGrandy suit"). The DeGrandy suit alleged that the then-existing Senate districts violated Section 2 of the Voting Rights Act and the Fourteenth Amendment to the United States Constitution by diluting the voting strength of Hispanic voters. Subsequently the DeGrandy suit was amended to seek additional relief under Section 5 of the Voting Rights Act and the Fifteenth Amendment to the United States Constitution. On March 27, 1992, a three-judge court was convened to hear the suit.

On April 7, 1992, the Florida State Conference of NAACP Branches and a group of individual African-American voters filed a separate suit challenging the then-existing Senate districts under Section 2 of tha Voting Rights Act and the Fourteenth and the Fifteenth Amendments to the United States Constitution ("the NAACP suit"). On April 9, 1992, the three-judge court ordered the NAACP suit consolidated with the DeGrandy suit.

On April 10, 1992, the Florida legislature adopted Senate Joint Resolution 2-G ("SJR 2-G"). Among other things, SJR 2-G set forth a redistricting plan for the Florida Senate districts.

On June 23, 1992, the United States filed a separate suit alleging that SJR 2-G's redistricting plan for the Florida Senate violated Section 2 of the Voting Rights

[1] The three-judge court also conducted proceedings to reapportion and redistrict Florida's congressional districts and the Florida House of Representatives districts, but those proceedings are not the subject of these appeals.

Act ("the United States' suit"). The United States' suit alleged that SJR 2-G fragmented the Hispanic population in Dade County in such a way that Hispanics would compromise a majority of the voting age population in only three Senate districts. However, according to the suit, if the Senate districts in Dade County were "divided into equally populated legislative districts which respect communities of interests and follow other nondiscriminating plan-drawing criteria, Hispanics would constitute a significant voting-age majority of the population in one additional . . . district." No vote dilution claim was made by the United States on behalf of African-American voters in the Dade County area. On June 26, 1992, the United States' suit was consolidated with the DeGrandy suit and the NAACP suit.

The trial involving the Florida Senate districts began on June 26, 1992.

During the second day of trial, the NAACP began to introduce evidence through one of its witnesses demonstrating the possibility of creating three Senate districts in the Dade County area in which African-Americans would comprise a majority of the voting age population.[2] The evidence consisted of a redistricting plan created by two members of the Florida House of Representatives, Rep. Peter R. Wallace and Rep. James Burke ("the Burke-Wallace plan"), which had been introduced during the legislative process that ultimately led to the adoption of SJR 2-G. This evidence was offered for the purpose of showing that SJR 2-G diluted the voting strength of

[2] Tr. Vol. III, 111; U.S. App. 87a. (The Jurisdictional Statement filed by the United States in No. 92-767 includes an Appendix that contains relevant portions of trial transcript Vol. III. That Appendix will be referenced herein as "U.S. App." Other relevant portions of the trial transcript found in Vols. IV, VI and VIII, however, are not contained in the Appendix to the United States' Jurisdictional Statement. Those trial transcript references are contained in the Appendix to this motion, and are referenced herein as "App.")

African-Americans in the Dade County area because it created only two Senate districts in which African-Americans constituted a voting age majority, whereas the creation of three such districts was possible.

Counsel for the DeGrandy plaintiffs objected to the introduction of the Burke-Wallace plan on the ground that the NAACP had not officially embraced it as a proposed remedy for the Senate districts in Dade County and, therefore, that the DeGrandy plaintiffs were surprised by the NAACP's evidence.[3] A lengthy colloquy took place between the court and counsel for various parties, including the DeGrandy plaintiffs and the NAACP.[4] At the conclusion of the colloquy, the court refused to admit a copy of the Burke-Wallace plan in evidence and ruled that the NAACP's evidence should be limited to showing that the DeGrandy plaintiffs' and the United States' proposal for the creation of a fourth Hispanic Senate district in Dade County would have a retrogressive effect on the interests of African-American voters. The court added, however, that if it found any violation of Section 2, then the Burke-Wallace plan would be considered as a possible remedy along with all other remedy proposals.[5]

Thereafter, as the trial progressed, several other witnesses testified about various aspects of the Burke-Wallace plan. For example, Dr. Ron Weber ("Weber"), one of the Senate defendants' expert witnesses, testified that the Burke-Wallace plan's three Senate districts in the Dade County area with African-American voting age population majorities were drawn in such a way that they likely would permit African-American voters to elect candidates of their choice from those districts.[6]

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[3] Tr. Vol. III, 112-13; U.S. App. 88a.

[4] Tr. Vol. III, 113-123; U.S. App. 88a-95a.

[5] Tr. Vol. III, 123-24; U.S. App. 95a-96a.

[6] Tr. Vol. VI, 132-142; App. 10a-17a.

One of the Senate defendants' witnesses was John B. Guthrie ("Guthrie"), the Staff Director of the Senate Committee on Reapportionment. During Guthrie's testimony, he was questioned by the court about the possibility of creating a redistricting plan with four Hispanic and three African-American districts in the Dade County area. The court characterized such a plan as "the ideal solution." Guthrie responded that modern computer technology might permit the districts to be drawn, but he questioned whether the number of voting age Hispanics and African-Americans residing in the districts actually would permit them to elect the minorities' candidates of choice.[7] Counsel for the NAACP also brought to the court's attention the fact that the NAACP's demographers had attempted to create a redistricting plan for Dade, Broward and Palm Beach Counties with four Hispanic and three African-American districts, but that they had been "unable to get the [minority voting age population] percentages of the districts up to a level that I believe the parties will find acceptable."[8]

At the close of the proof dealing with the Senate, the NAACP renewed its motion to have the Burke-Wallace plan admitted into evidence as proof of a Section 2 violation of the voting rights of African-Americans in the Dade County area. Counsel for the NAACP emphasized that the Burke-Wallace plan "is an essential component of the NAACP's [Section 2] case."[9] After hearing objections from several of the other parties, the court ruled that the Burke-Wallace plan would be admitted into evidence.[10]

In closing argument, counsel for the NAACP stated that if it were possible to create a viable redistricting

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[7] Tr. Vol. IV, 207-15; App. 2a-8a.

[8] Tr. Vol. IV, 216-17; App. 8a-9a.

[9] Tr. Vol. VI, 185; App. 18a.

[10] Tr. Vol. VI, 188; App. 19a.

plan with four Hispanic and three African-American Senate districts in the Dade County area, the NAACP favored such an approach. According to the NAACP's counsel, "[i]f it is possible to accomplish that solution, the NAACP supports that solution. [The] NAACP does not seek to come into this court and advance a claim on behalf of its members at the expense of another minority group." [11] However, absent the demonstrated ability to create such a redistricting plan, the NAACP argued that a preference in the creation of the Senate districts should be given "to the minority group that has demonstrated historically the greatest difficutly in achieving political empowerment in South Florida," namely, African-Americans.[12]

On July 1, 1992, at the conclusion of the Senate portion of the trial, the three-judge court issued its ruling from the bench concerning the Senate redistricting issues. The court ruled that a fourth Hispanic Senate district could be created in the Dade County area consistent with the principles of *Thornburg v. Gingles*, but that the DeGrandy plaintiffs and the United States had failed to prove that the creation of such a district would not have a retrogressive effect on African-American voters in the area.[13]

Immediately thereafter, counsel for the DeGrandy plaintiffs made a motion for reconsideration.[14] Counsel pointed out to the court that one of the DeGrandy experts had succeeded in fashioning a Senate redistricting plan with four Hispanic and three African-American districts in the Dade County area, all of which contained sufficiently large concentrations of minority voting age populations to give minority voters an opportunity to elect

[11] Tr. Vol. VIII, 35-36; App. 22a.

[12] *Id.*

[13] U.S. App. 100a.

[14] U.S. App. 105a.

their candidates of choice. The court was advised that the DeGrandy plaintiffs had intended to proffer the redistricting plan during the remedial phase of the proceedings. The court denied the motion without explanation.[15]

On July 17, 1992, the three-judge court issued a written opinion explaining its bench ruling. The court found that the DeGrandy plaintiffs and the United States had proven that SJR 2-G volated Section 2 by diluting the voting strength of Hispanics in the Dade County area Senate districts. It also found that the NAACP had proven that SJR 2-G violated Section 2 by diluting the voting strength of African-Americans in the Dade County area Senate districts.[16] The court then concluded that the appropriate remedies for these two violations were "mutually exclusive." Accordingly, the court decided to give deference to SJR 2-G as an expression of State policy and to impose that plan "as the remedy in this case." [17]

ARGUMENT

Both the DeGrandy plaintiffs and the United States have argued in their respective appeals that the three-judge court's liability determination under Section 2 should be summarily affirmed, but that the court's remedy determination should be summarily vacated and remanded with instructions to conduct a remedial hearing. The NAACP supports that position.[18]

[15] *Id.*

[16] Significantly, neither the DeGrandy plaintiffs in their appeal (No. 92-593) nor the United States in its appeal (No. 92-767) has challenged this liability determination.

[17] U.S. App. 63a-66a.

[18] Because the NAACP did not file an appeal or cross-appeal, it is mindful that under established precedent it cannot seek an outcome in these appeals that "would result in greater relief than was awarded . . . by the district court," *Barrett v. Varchi*, 443 U.S. 55, 69 n.1 (1979). Nevertheless, the NAACP wishes to advise the Court of its support for the appellants' basic position concerning a remand.

When the NAACP announced to the three-judge court during the Senate redistricting trial that its demographers had attempted unsuccessfully to create a viable Senate redistricting plan with four Hispanic and three African-American districts in the Dade County area, it did not intend to suggest that it possessed the last word on the subject. In fact, the NAACP's counsel explained to the court that the NAACP's efforts to create such a plan had taken place only during the preceding evening, and that approximately ten hours had been devoted to the effort by its demographers.[19] There was testimony from various other witnesses throughout the trial suggesting that far more than ten hours typically is required in order to create a state-wide redistricting plan.

Following the court's bench ruling on July 1, 1992, counsel for the DeGrandy plaintiffs announced to the court that one of the DeGrandy experts had succeeded in creating a viable district configuration in the Dade County area with four Hispanic and three African-American districts. That is the same district configuration which the court earlier had characterized as "the ideal solution." Without explanation from the court, the DeGrandy plaintiffs were denied the opportunity to demonstrate during a remedial hearing how their proposed redistricting plan might resolve the court's expressed concern about retrogression. Likewise, the other parties, including the NAACP, were denied the opportunity to fully examine the DeGrandy plaintiffs' proposed redistricting plan and to determine whether it offered an appropriate remedy for the dilution of the voting strength of African-Americans in the Dade County area.

Federal district courts traditionally have conducted bifurcated proceedings in Section 2 cases, with the first phase focused on liability and the second phase focused on remedy. *See, e.g., Gingles v. Edmisten*, 590 F. Supp.

[19] Tr. Vol. IV, 216-17; App. 9a.

345 (E.D.N.C.), *aff'd in part and rev'd in part sub nom., Thornburg v. Gingles*, 478 U.S. 30 (1986); *Bradford County NAACP v. City of Starke*, 712 F. Supp. 1523, 1526 (M.D. Fla. 1989). This procedure has the obvious advantage of avoiding rushed judgments based on inadequate information. Regrettably, just such a rushed judgment led the three-judge court in these cases to conclude—perhaps prematurely—that it was not possible to create a viable Senate redistricting plan for the Dade County area with four Hispanic and three African-American districts.

If these cases are remanded for a remedial hearing, it might be shown that the DeGrandy plaintiffs' redistricting plan or some other plan is capable of providing complete relief for the two Section 2 violations that have been found to exist. On the other hand, it might be shown that the intricate demographics of the Dade County area simply will not permit the fashioning of such an "ideal remedy." Justice requires, however, that the parties be given an opportunity to try.

CONCLUSION

The three-judge court's liability determination regarding the State's plan for redistricting the Florida Senate should be summarily affirmed. The three-judge court's remedial order should be summarily vacated, and the cases remanded for a remedial hearing to determine whether complete relief can be fashioned for the statutory violations that have been found to exist.

Respectfully submitted,

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January 1993

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

TCA 92-40015-WS

MIGUEL DEGRANDY, *et al.*,
Plaintiffs,

and

GWEN HUMPHREY, *et al.*,
Plaintiffs-Intervenors,

vs.

WILLIAM P. BARR, as Attorney General of the United States of America,
Third-Party Defendant.

TCA 92-40131-WS

FLORIDA STATE CONFERENCE OF NAACP BRANCHES, *et al.*,
Plaintiffs,

vs.

LAWTON CHILES,
in his official capacity, *et al.*,
Defendants.

TCA 92-40220

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF FLORIDA, *et al.*,
Defendants.

VOLUME IV

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on to be heard before the Honorable JOSEPH W. HATCHETT, United States Circuit Judge; WILLIAM STAFFORD, Chief United States District Judge; and ROGER VINSON, United States District Judge, in the United States Courthouse, Tallahassee, Florida, on the 29th day of June, 1992.

* * * *

[207] BY MR. HEBERT:

Q How long would it take, based on your experience, I think you said three thousand plans were drawn on the computers for the Senate?

A Yes. You want to start in Fort Lauderdale and include all of Dade and Monroe?

Q No, I didn't say anything about starting anywhere, Mr. Gutherie. I was asking you how long it would take, using Fort Lauderdale as your starting point in Florida and taking every area south of that, including that area. If you were told by the Court draw four Hispanic VAP majority districts and three African-American majority VAP districts, how long on your computer would it take you and your Senate staff to do that?

A The first thing I would advise the Court is that it may be impossible to accomplish that task in any amount of time.

Q How long would it take you to find out whether it was possible or impossible? How long would it take you to generate [208] the maps and the statistics?

A Addressing—that's a—I don't know. I honestly don't know.

Q Well, we'll try it this way. During the course of the legislative session or any time in 1992, did any legislator ever come to you and say, "Can you see whether or

not this district can be revised"? Did that ever happen once?

A I—it may have. I don't recall it.

Q. What about on the last night of the session, did that ever happen on the last night?

A We did have a last night of the session; yes, sir.

Q Did that happen where people came to you and said, "Gee, we need to make some changes in the map. Show us what this looks like real quick, get on the computer and redraw the lines"? Is it your testimony here to this Court that that never happened in your offices?

A The last week in fact of the legislative session, as you might suppose, was a fairly hectic period. And, yes, there were numbers of people in our office.

Q Numbers of people in your office?

A Including legislators, including the media, including—we have public access terminal. The public was using the computers right up to the very end. We have our minority work stations. And, in fact, the minority members of the legislator—

[209] JUDGE STAFFORD: You're talking about Republicans, not racial minorities?

THE WITNESS: That's correct; although I know that Senator Girardeau was up there much of the time.

Was I ever asked by a member of the Senate or member of the legislature to do "what if" scenarios? Yes, I was asked to do that.

BY MR. HEBERT:

Q. Now, what was the shortest amount of time, the shortest amount of time it ever took you to respond to one of those "what if" questions.

MR. ZACK: Objection, Your Honor. What if what? What if the sky is going to fall down in the next minute and a half, hopefully a second and a half?

MR. HEBERT: I was trying to use his term.

JUDGE HATCHETT: Overruled.

THE WITNESS: Okay. I can't recall what the easiest "what if" postulate that was ever proposed to me was.

JUDGE HATCHETT: That's fine. You've answered the question.

THE WITNESS: Yes.

I can say that the issue of is it possible to draw four Hispanic VAP majority and three African-American VAP majority districts in South Florida, that is a very difficult question. It's a difficult "what if" postulate because of the [210] complexity of the demography of South Florida. It's not something that I can sit here and just opine. It's something, frankly, that I have given some thought to. And my—I don't have a sense of it at all. My expectation is that it would be very difficult to do that.

JUDGE VINSON: Mr. Gutherie, I'm inferring from your answer that the answer is no within the bounds of reasonable expectations of districts? Is that a fair inference to draw from what you're saying?

THE WITNESS: What I have done, Judge Vinson, from the plans that have been placed before the legislature—and many people have been working on these plans for many months now. And I've got to believe—with several different theories about what we ought to accomplish in redistricting.

And the plans that are before the Court, I think they're responsive to say that that's the best we have got along the way. And nobody yet has accomplished that. Okay. Nobody yet has proposed a plan which has four majority African-American—four majority Hispanic-American VAP districts which they believe—which, and, again, normally map makers are shooting for a super majority VAP with the Hispanic districts and three African-American VAP districts in South Florida.

JUDGE VINSON: Have you tried to do it?

THE WITNESS: Have I tried to do it? No.

[211] JUDGE VINSON: Okay.

JUDGE STAFFORD: Mr. Hebert, let me ask you: Does that question presuppose a ten-percent deviation or are you back to his confine of .4 percent?

MR. HEBERT: I haven't actually focused on the deviation. And the question really could have taken into account either scenario. And maybe I should amend my question and say—if we were to—and I think it's a proper--perhaps he's limiting himself because of the .4 percent instead of being willing to enlarge that.

BY MR. HEBERT:

Q Would your answer make a difference if the deviation were permitted to be as high as eight or nine percent?

A It's an empirical question. And I'm relucant to guess as to what the answer is.

Q And how many hundreds of hours did you say that you worked on the computers?

All right. Let me see if I can make the question a little easier for you. Again, using the geographical confines of Fort Lauderdale south as the point of reference, how long would it take you, Mr. Gutherie, to draw four Hispanic districts, two black voting age population majority districts, two majority black voting age, four Hispanic population, voting age population, and one what you term black access district? Could that be done faster than drawing three majority black [212] districts? How long would it take you? That's all I'm asking.

A I do not believe that—

Q Assuming it can be done. I'll even concede that. Assuming it's possible to do it, how long does the computer take in your office to draw such a district if this Court orders you to go back to your office and see how long it takes? Give us an estimate of how long that would take you.

A The answer—I think we're trying to make redistricting into a bit easier a process or working on the

computers into a bit easier process than I in fact believe it is. Because of the—because the concentrations as indicated by the black and Hispanic maps that we have here, because all of the black citizens or persons don't live within the same area and all of the Hispanic persons don't live in exactly the same area and because when they do live in those areas, in order to avoid getting a very large VAP majority it is necessary to include some outlying areas, what is required oftentimes is actually going in at the block level and making decisions block by block of, okay, how many black persons are in this Census block, how many Hispanic persons are in this Census block. And in terms of the total equation involving three hundred thousand Census blocks, am I going to get a better result if I put this Census block in district A or district B. And the best example is a tract or block which has 40 percent Hispanic VAP.

JUDGE STAFFORD: But all this—

[213] THE WITNESS: Excuse me.

JUDGE STAFFORD: But all of this information is already in your computer; isn't it?

THE WITNESS: It's in the computer.

JUDGE STAFFORD: All you have to do is bring it up?

THE WITNESS: Yes.

BY MR. HEBERT:

Q When was the last time you ever worked on—

JUDGE VINSON: Wait.

MR. HEBERT: I'm sorry.

JUDGE VINSON: I would like to get an answer, though, if you can give it to us: How long would it take?

THE WITNESS: Starting—well, I know that the wish-bone-shaped district in Northeast Florida that was proposed by the Senate and was ultimately adopted by this Court, it's a—or in the Florida plan, the district

which goes from Jacksonville down to Alachua County, in both those instances, literally scores of hours were spent crafting that single district in a way to try to create or maintain an African-American opportunity district.

The problem in Northeast Florida is that the urban—and also in Miami—is that the urban core has not kept pace with the rest of the state in terms of population growth. And so in those districts you could add population and adding populate oftentimes means going outside the urban core. The [214] closer the margins are that you're starting with, the more difficult it is to cross the threshold of a 50.1 or a 65 percent or whatever.

JUDGE VINSON: Answer the question. How long would it take?

THE WITNESS: Starting from scratch, it would be —it would take a very, very long time.

JUDGE VINSON: Eight hours? Sixteen hours? Two hours? One hundred hours? What are we talking about? You're not starting from scratch now. You have got a lot you have already got worked out.

THE WITNESS: The—I would guess that it would take ten to fifteen hours to ascertain within a geographic confine whether it was going to be possible. We do not have a good target here yet. If we're talking majority Hispanic VAP, 50.1 percent Hispanic VAP and 50.1 percent African-American VAP and we want four Hispanic and three African-American district, then the other thing that I would have to have as a starting point is how large an area are we willing to look at. Do we want to limit our focus to only Dade and south Broward County? Do we want to go to Fort Lauderdale? Do we want to go to Brevard County?

JUDGE VINSON: Well, he's already said including Fort Lauderdale, Fort Lauderdale south.

THE WITNESS: Fort Lauderdale south, I do not believe [215] it is impossible, given the rest of time, based on the 1990 Census figures to create two—well—three African-American and four Hispanic VAP's—

JUDGE VINSON: No, he asked you two black districts, one access district, plus four Hispanic districts, all with a VAP majority.

THE WITNESS: Assuming that access is greater than 25 or 30 percent, I don't believe that you can have two black African-American majority, one African-American access and four Hispanic VAP majority districts in that area. I don't believe that it's possible.

MR. BURR: Your Honor, if I could just make a brief statement. I know this is little irregular. And this is information that is not in the witness' knowledge, but I believe the Court obviously is struggling with trying to get to a solution.

JUDGE HATCHETT: Well, we don't ordinarily have people just stand and give speeches. Could you communicate with your co-counsel there and have him put it in some type of a question?

MR. BURR: Yes. I'm trying to assist the Court. I will be happy to be quiet.

JUDGE HATCHETT: Find some other way of doing that rather than simply standing up and testifying.

MR. ZACK: Your Honor, may I make a suggestion?

[216] JUDGE HATCHETT: Yes, Mr. Zack.

MR. ZACK: I don't believe this Court should have a plan that wouldn't have been precleared. In preclearance we were told that 65 percent, 64.3 was the minimum that would be precleared upon a Hispanic seat. For this Court to ask questions of a 51 percent VAP Hispanic seat wasn't even passed preclearance by the Justice Department. I would ask the Court to—in order to help the Court understand what is possible here—to pose the question in terms of electable seats as Gingles requires. I would ask the Court to do that.

JUDGE HATCHETT: We have heard you, Mr. Zack.

MR. ZACK: Thank you, Your Honor.

MR. HEBERT: May I proceed?

JUDGE HATCHETT: Yes, you may.

MR. HEBERT: For the record, Mr. Burr simply wanted to bring to the Court's attention the fact that last night he and his parties drew a plan for the South Florida area that did exactly what I think my question proposed and did it last night.

MR. BURR: Not quite, almost but not quite. We limited it not to Fort Lauderdale south but to the three-county area.

MR. HEBERT: Which is—

JUDGE HATCHETT: Palm Beach, Broward and Dade?

MR. BURR: That is correct, Your Honor. And I have [217] given the results of that effort to Mr. Hebert. And all I can say is that based on our experience it is technically feasible to draw a four and three, but we were completely unable to get the percentages of the districts up to a level that I believe the parties will find acceptable. And that effort took approximately ten hours.

JUDGE HATCHETT: Thank you.

He agrees with you, Mr. Zack.

MR. ZACK: I better sit down.

* * * *

VOLUME VI

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on to be heard before the Honorable JOSEPH W. HATCHETT, United States Circuit Judge; WILLIAM STAFFORD, Chief United States District Judge; and ROGER VINSON, United States District Judge, in the United States Courthouse, Tallahassee, Florida, on the 30th day of June, 1992, commencing at 8:16 a.m.

* * * *

[132] CROSS EXAMINATION

BY MR. BURR:

Q Dr. Weber, do you have the basic plan statistics for the Reaves/Brown/Hargrett plan and the De Grandy plan in front of you?

A No, sir, I do not.

Q Dr. Weber, let me pass you a booklet that has Plan 275, the De Grandy plan, and Plan 330, Hargrett/Brown/Reaves. That's the first two tabs. Now, if you would please, just look at the first tab, I believe, which is the Hargrett/Brown/Reaves plan, and tell me in that plan how many black majority VAP districts there are that fall within Dade and/or Broward Counties?

A We're looking at the Hargrett/Reaves/Brown?

Q Yes, Hargrett/Reaves/Brown, the two majority black VAP districts?

MR. HEBERT: Could we have identified what document counsel has provided to the witness?

MR. BURR: It is a compilation of the plans, which is already a part of the record. I'm sorry, if I could give you the identifying exhibit number, we could pull it from the Court records, but it's the basic plan stats. Do you [133] have the plan stats for Hargrett/Brown/Reaves in front of you?

A Yes, I do.

Q Could you look at the South Florida districts and tell me of the two black majority VAP districts, what actually is the black VAP?

A In District 36, the yellow district on the map, which goes from Opa Locka to Homestead, that is 59.7 percent VAP, let me just check the numbers just to be sure nobody copied this wrong. I'm relying on something else that somebody wrote here. Yes, 59.7 percent, African American VAP.

Q And in the second district, that is the second black majority district?

A Second African American district, which begins in north Dade and then goes on up into Fort Lauderdale.

Q Yes.

A That is 58.8 percent.

Q 58.8, and what is that district number?

A That's District 32.

Q Okay, now, if you will refer under the next tab to the De Grandy plan and tell me the comparable black VAPs in those two black districts?

A I think they use the same numbers the—could I move that so the Court can see what I'm talking about? (Pause) I always like pictures.

[134] Q If you would just double check under the second tab where you have the planned stats in front of you on the De Grandy plan and confirm for me if you will that the black voting age—

A Yes, in District 36, which is the yellow district, somewhat differently configured than in the Hargrett/Reaves/Brown plan, the number is 57.3 African American VAP.

Q 57.3?

A Yes. And then in the second—what's different about that district, while I'm talking about that, is that that district goes a little further north than the comparable district. It has—the comparable District 32 in Plan 275, which is De Grandy, is 57.1 percent African American VAP, but two-thirds of that district is in Broward rather than in Dade. It's closer to 50/50.

Q If I understand your testimony, under Reaves/Brown/Hargrett, we have 59.7 and 58.8, and under De Grandy we have 57.3 and 57.1?

A Yes, sir, that's correct.

Q Now, do you have an opinion about whether or not those percentages exceed the percentages that are actually needed in order for blacks to elect candidates of their choice from those two districts?

MR. HEBERT: Object on the grounds that it goes [135] beyond the scope of direct examination. This witness was not asked about the election abilities of black voters on direct.

JUDGE HATCHETT: Objection overruled, but you'll be given a chance to cross again.

THE WITNESS: The answer is yes, I have an opinion.

BY MR. BURR:

Q You do have an opinion? What is your opinion on that particular point?

A I have analyzed the turnout for those particular districts, what was the turnout on election day. Okay, for those districts. It is my opinion, based upon that analysis of turnout, the same kind of analysis I did for the Hispanic districts, that those districts are designed—and I'm sorry to use these words, and they may be offensive to some people in the courtroom, but they're designed to waste African American votes.

Q Is that the phenomenon that is known in the—this area of the law as "packing"?

A Yes, sir, they are, they're packed, and there are more African Americans than are necessary to provide a realistic opportunity for African Americans to elect candidates of choice.

Q Do you have an opinion about whether or not this packing [136] phenomenon has an impact on the ability to draw a third district in the South Florida area with a black majority voting age population?

A I believe what I've seen in the two plans, if you go further north from Fort Lauderdale, that neither of them have a VAP majority district that's African American. And furthermore, I did tests of, again, turnout tests for those particular districts, just to see how they would work, and they fail miserably in terms of their ability to put African Americans in control on the general election day.

Q So if I understand you, you believe that the packing of the Districts 32 and 36 does in fact have a negative influence on the ability to create an additional majority seat just to the north?

A That's right, and that's why I said this morning on my direct testimony that I thought what I saw in the attempts to create four Hispanic VAP majority districts in Dade County had a decimating effect on African American voting age population in South Florida.

Q Now, I would like to pass you NAACP's Exhibit No. 1 and ask you some questions about it.

MR. GERBER: May I see that? Is that the exhibit you proffered?

MR. BURR: Yes, and provided you copies.

MR. GERBER: Your Honor, there were objections [137] sustained to the introduction into the record of that plan.

JUDGE HATCHETT: I don't think it has to be in evidence for him to be questioned about it.

MR. BURR: Your Honor, may I show this to the witness?

JUDGE HATCHETT: Yes, yes.

MR. GERBER: Your Honor, I'm going to object to allowing the witness to see that. If it's not in evidence then it's hearsay, if he reads off that document. He cannot do that.

JUDGE HATCHETT: Objection overruled. Let's see where he's going.

BY MR. BURR:

Q Dr. Weber, I would like for you to focus your attention on the document that I have just handed to you, which is NAACP Exhibit 1, to Districts 35, 37 and 39, and I would like to ask you some questions about the reconstituted election statistics in those three districts, 35, 37 and 39.

A This is a House Report Format.

Q I'm sorry?

A This is called the House Report Format so everyone knows what I'm reading from. And I say this because the—there are slight differences in methodology of what reconstitution—

[138] JUDGE HATCHETT: Hold just a minute. Are you simply—what are you attempting to do with this document?

MR. BURR: I'm attempting to have Dr. Weber offer an opinion, if he can, about whether or not the three black majority voting age population districts that are possible to be created in the South Florida districts—South Florida area, are effective in that they in fact would allow blacks to elect candidates of their choice.

MR. GREGORY: Your Honor, we would renew and reaffirm the objection we made—

JUDGE HATCHETT: We haven't asked for argument.

MR. RUMBERGER: Renew our objection. (Pause)

JUDGE HATCHETT: The Court has a couple of questions. Dr. Weber, have you seen this document before—before it was handed to you today?

THE WITNESS: I don't believe so.

JUDGE HATCHETT: So obviously you have not had any opportunity to analyze it, have you?

THE WITNESS: While you were conferring I looked at some numbers. I got to be honest with you, Your Honor, about that.

MR. BURR: There's been testimony, previously.

JUDGE HATCHETT: Here's our ruling and you can decide how you want to do it. If you're simply going to ask this witness to publish what's in that document, the Court [139] is going to rule against you. If you're going to do something more than that, something that he has gained as a result of looking at and observing that document, then questioning along that line may be proper. But if you're simply going to have to have him state what's in the document, then we will entertain objections.

MR. BURR: Thank you, Your Honor, I will proceed as you have directed.

BY MR. BURR:

Q Now, Dr. Weber, what I would like for you to do is look at four election contests reflected in that document.

A Yes, sir.

Q That is the Martinez/Chiles race, the Mack/Mackay race, the Alcee Hastings runoff election and the Leander Shaw retention election. I would like for you to focus on those four results for the three districts that I have indicated to you, that is 35, 37, 39.

A I guess I need to get some additional ground rules established.

JUDGE HATCHETT: Go on and answer it anyway you want and ground rules will be formed as—

BY MR. BURR:

Q Have you had a chance to look at the results?

A I looked at the results, but I think I always need to look at the map because I don't know precisely where these [140] districts are.

Q You will find the maps on the front of the document that I've given you.

A I know they're in South Florida. I know that, but the numbers.

Q The maps are on the front of the document?

A I need to see where they go and what other voters they involve in order to answer questions.

A Okay. I'm ready to answer.

Q Now based on your review of the maps and your review of the reconstituted election returns, do you have an opinion about whether or not those three districts would allow blacks to elect candidates of their choice?

A Yes.

Q What is that opinion?

MR. GERBER: Objection, Your Honor, lack of predicate.

JUDGE HATCHETT: Objection overruled.

BY MR. BURR:

Q What is your opinion?

A What I would like to do is bifurcate my answer. First step you've got to look at the Hastings results for the purposes of determining whether or not African American voters would have an opportunity to nominate in the Democratic primary a candidate of choice, and I think that's [141] the value of Hastings numbers. And I think what they're very valuable for in this particular case is that was not the most favorable circumstances of an election to achieve white crossover in the Democratic primary because of former Judge Hastings' problems with the U.S. Senate. So I would use them for that purpose, okay? And on the basis of what this reconstituted election data shows, I wouldn't have any doubt that in any of these districts the African American voters would be able to control the Democratic primary and to nominate their candidate of choice, and probably little or no white crossover in order to accomplish it.

Q Thank you.

A I got to go to the general election now, next step, to elect, now, okay?

Q Uh-huh.

A What I'm trying to argue is that Hastings doesn't tell us whether anyone can elect a candidate of choice.

You've got to look at general election data to do that. Okay? And in that case, looking at Chiles and Mack's performance in these reconstituted elections, Chiles in '90 and Mack in '88, I have no doubt about District 37 and 39. I think they would elect a candidate of choice and I know that—I think just from looking at the map of District 37. it includes the—I think the parts of Broward County that would be—that have shown in the past support for African [142] American candidates and they've not been able to nominate and elect their candidates in that area.

I think I would be a little more conservative about my opinion in District 35 because it involves Palm Beach, and I think they would allow the election of a candidate of choice, but I think it would depend very significantly on the degree of cohesiveness on the part the African American community in the election, and also on the turnout. And I think under the circumstances in which the turnout were to be relatively equal, among the groups, particularly nonLatin whites and African Americans, and under the circumstances in which the African American community is cohesive—and they generally are in general elections behind Democratic candidates—then I think they would be able to elect candidates of choice for the district, yes.

Q It is an unqualified yes with respect to Districts 37 and 39 and a qualified yes with respect to District 35?

A Yes, that's a very nice way to summarize it.

* * * *

[185] JUDGE HATCHETT: All right. Anything further on the Senate side?

MR. BURR: Yes, Your Honor.

At the commencement of the portion of the trial having to do with the Senate case we moved into evidence, proffered NAACP Exhibit 1, and at that point it was not made, it was made a part of the record but not received in evidence.

At this point Mr. Guthrie has testified about it. NAACP Exhibit 1 has referenced it. I believe Representative Logan has testified about it, certainly the last witness has now testified about it and explained it, and it is an essential component of the NAACP's case.

I would not, if this case goes up on appeal, I [186] want it to be clear what the NAACP's case consisted of, and we are left with a lot of testimony about a document that is the heart, as a matter of fact it is the only part of our case that is not formally received in evidence, and I would proffer it at this point and ask that it be received.

JUDGE HATCHETT: One minute.

MR. BURR: It is the NAACP's Section 2 case.

JUDGE STAFFORD: What is that exhibit?

MR. BURR: That is the, it is the Burke-Wallace plan for the Senate.

JUDGE HATCHETT: You may have very short argument on this matter. We are—

MR. BURR: Well—

JUDGE HATCHETT: Not you, Mr. Burr, the people I assume who are going to—(laughter)—people I assume who are going to object to it. I assume you are going to object?

MR. GREGORY: Mine is very brief, Your Honor. My recollection was this Court ruled that should we get to remedial stage that you would then consider the plan if necessary, but other than that the Court was going to deny it being introduced into evidence.

I don't see that there is any prejudice because if we don't get to remedial stage, it's academic if we [187] do, it might be considered at that point, so I would ask the Court merely to reaffirm its earlier ruling.

JUDGE HATCHETT: Mr. Cardenas?

MR. CARDENAS: Yes, Your Honor, I would certainly agree with counsel. Our spirit is that all doors are open at the remedial stage, but bear in mind our objection for it to be submitted into evidence at this point stems from two reasons.

One, the issue that was covered at the very outset by Your Honors in terms of the fairness or the timeliness of the document. The other and most prevailing argument was while counsel decided on his, to propose his or agree with the motion for a directed verdict against the plaintiffs in the case, at that point in time something happened in my opinion which in essence makes this document not introducible by plaintiffs in this case since we are dealing with the State Senate, and there has been a motion for a directed verdict made by the NAACP in the matter, and from those, from those grounds primarily we would object to its submittal now.

As we said, we certainly agree that if we get to a remedial stage there, their input is very valuable, and we would agree with that, but certainly at this stage it doesn't make any sense.

[188] MR. BURR: May I respond briefly?

JUDGE HATCHETT: We don't need any response.

MR. BURR: Okay.

JUDGE HATCHETT: Government—NAACP Exhibit 1 will be admitted into evidence.

(Whereupon, the aforementioned document was received in evidence as NAACP Exhibit Number 1.)

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VOLUME VIII

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on to be heard before the Honorable JOSEPH W. HATCHETT, United States Circuit Judge; WILLIAM STAFFORD, Chief United States District Judge; and ROGER VINSON, United States District Judge, in the United States Courthouse, Tallahassee, Florida, on the 1st day of July, 1992.

* * * *

[33] MR. BURR: May it please the Court. The NAACP has appeared before this Court over the past five days to present two challenges to the Florida plan under the United States Constitution and the Voting Rights Act, one having to do with the House district in Escambia County and the second challenge being to the Florida plan's Senate districts in South Florida that have the effect of diluting the voting strength of blacks. And I emphasize the word "blacks" as opposed to Hispanics in the South Florida area.

Given what we have been through for the past five days and the record that has developed here, I submit to you that the record is absolutely crystal clear that a Section 2 violation exists with respect to blacks in South Florida. And not only is that Section 2 violation manifestly clear from the record itself, but I submit to Your Honor that the case that has been made out under Section 2 with respect to the Senate districts in South Florida is completely unrebutted. No attorney for either party on either side of this room has come forward in an effort to challenge the evidence that has been proffered to the Court by the NAACP with respect to the Senate plan.

What then exactly is the evidence that comprises the NAACP's Section 2 case in South Florida? What are the elements of a Gingles analysis that we believe the record reflects here? First of all, Mr. Gutherie [34] testified that blacks are sufficiently numerous and geo-

graphically compact to permit the drawing of three black majority VAP districts in South Florida. That testimony is in Volume 4, Pages 200 to 202.

Mr. Burke, Representative Burke, came in here this morning and corroborated that testimony. And if that's not enough, NAACP Exhibit No. 1 demonstrates in very graphic form that it is possible to draw three majority black districts. So, I submit to Your Honor that that makes out the element of the first prong under Gingles.

Secondly, Dr. Lichtman testified that blacks in Dade County and the surrounding areas are politically cohesive and, in his words, that they unite in large numbers behind candidates of their choice. That testimony is in Volume 3, Page 35. And if that testimony in and of itself is not sufficient, the evidence in the Congressional phase of this hearing is replete with similar types of testimony not only as to Dade County but the surrounding areas in South Florida. And I submit to Your Honor that that establishes the second prong of the Gingles test.

Thirdly, Dr. Lichtman testified that a pattern exists in South Florida of Hispanics and whites combining their political strength to defeat the election of candidates of blacks' choice. And, there again, if the testimony of Dr. Lichtman standing alone is not sufficient [35] to establish that point, I submit to Your Honor that that is the very essence of what the case of Meek versus Metropolitan Dade County was all about, an 11th Circuit Opinion. And this Court can certainly take judicial notice of the District Court's record in the Meek case that establishes that point abundantly.

Faced with this record, the NAACP believes that it is incumbent upon this Court to order the creation of three Senate districts in South Florida with a 50 percent or greater black voting age population. In fact, I would submit to Your Honors that Section 2 of the Voting Rights Act requires the creation of just such districts.

Now, the problem for us is that such a remedy presents this Court with a problem, with a dilemma, because His-

panics may—I don't know; I am not casting a value judgment on that—but certainly the Hispanics may have their own separate and independent viable Section 2 claim.

Now, for the sake of argument, assuming that this Court actually is faced with two viable claims in South Florida, how is this Court to resolve that problem? Of course, in an ideal world, the Court could simply order the drawing of four majority Hispanic districts and three majority black districts for the Senate. If it is possible to accomplish that solution, the NAACP supports that solution. NAACP does not seek to come into this Court and [36] advance a claim on behalf of its members at the expense of another minority group.

As I made an announcement to this Court several days ago, the NAACP has drawn a fourth replan and if the parties are ordered to submit proposed remedies to this Court, that will in fact be the NAACP's preferred remedy that will be proffered to this Court. Whether or not anybody can agree on it or buy off on it is another question, but that is the NAACP's preferred remedy.

On the other hand, what happens if this Court untimately concludes that a 4/3 solution for the Senate in South Florida is not possible? What if there really are two viable and competing and mutually exclusive claims? And I submit to Your Honor that the solution at that point is to in effect give the edge to the minority group that has demonstrated historically the greatest difficulty in achieving political empowerment in South Florida. And I submit to Your Honor that the record is clear that that is African-Americans.

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